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In the

Supreme Court of the United States

OCTOBER TERM, 1966

No. 987

PEARLINE PORTER, PAULINE P. LEONARD and GEORGE C. KEMBLE, Trustee,

Petitioners,

v.

GLADYS E. PORTER,

Respondent.

MOTION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

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MOTION AND ARGUMENT

Petitioners respectfully pray that this Court rehear their petition for writ of certiorari and issue its writ to review the judgment of the Supreme Court of Arizona, entered July 14, 1966; the petition was denied by order of this Court entered March 20, 1967. Citations to opinions below, a statement of this Court's jurisdiction, and a detailed statement of the case are contained in the Petition for Writ of Certiorari.

Rehearing is requested for three reasons:

1. The Supreme Court of Arizona refused to give effect to a delivered deed of land executed pursuant to the order of an Idaho court in a divorce proceeding in which all parties in the Arizona court were participating parties (or privies) in the antecedent Idaho proceeding. The question presented in this cause, whether equitable decrees ordering the conveyance of land are entitled to full faith and credit, is of transcendent importance to the orderly judicial determination in divorce suits of private, multi-state interests in land. The adjustment of matrimonial property rights in cases in which the divorcing court has the parties before it requires that it have power to make a final, binding determination of those rights.

2. The judgment of the Supreme Court of Arizona is plainly wrong under the precedents established by this Court: Arizona's refusal to recognize the property rights Petitioners acquired by virtue of Respondent's compliance with the order of a sister-state court violates basic principles of the full faith and credit clause and of the due process clause.

3. Arizona's holding is contrary to the principles of equity power approved by this Court and contrary to the holdings of all similar cases heretofore considered by the courts of other states.

The essentials of this case may be stated simply. An Idaho court ordered Respondent, Gladys Porter (the defendant in

a divorce suit) to convey her interest in Arizona realty to Petitioners Pearline Porter and Pauline Leonard (intervenors in the divorce suit) and to Petitioner George Kemble's predecessor in title Arnold Porter (plaintiff in the suit); the court's order was made to carry into effect its division of the parties' matrimonial property rights and the rights of the intervenors in that property. Respondent executed quitclaim deeds pursuant to the decree and Petitioners filed them of record in Arizona. In a subsequent Arizona proceeding an Arizona court refused to give effect to the deeds or to give full faith and credit to the Idaho decree that underlay the deeds. The Supreme Court of Arizona affirmed. No question of local land law was involved—the question was one of federal law only. The deed complied in all respects with local Arizona law respecting conveyances and no question of the deed's validity has been presented on grounds other than the effect in Arizona of a deed executed in compliance with the order of a foreign court.

Since Chief Justice Marshall's opinion in *Massie v. Watts*, 6 Cranch (U.S.) 148 (1810), an unbroken line of authority has acknowledged the proposition that a court of equity with personal jurisdiction of a defendant has power to compel him to convey land by its decree. In *Fall v. Eastin*, 215 U.S. 1, 5 (1910), this Court said:

> The territorial limitations of the jurisdiction of courts of a state over property in another state has a limited exception in the jurisdiction of a court of equity, but it is an exception well defined. A court of equity, having authority to act upon the person may indirectly act upon real estate in another state, through the instru-

> mentality of this authority over the person. Whatever it may do through the party, it may do to give effect to its decree respecting property whether it goes to the entire disposition of it or only to affect it with liens or burdens. Story, Confl. L. §544. In French v. Hay (French v. Stewart), 22 Wall. 250-52, 22 L. Ed. 857, 858, this court said that a court of equity, having jurisdiction *in personam*, has power to require a defendant "to do or to refrain from doing anything beyond the limits of its territorial jurisdiction which it might have required to be done or omitted within the limits of such territory.

Because of this principle of power, the Late Brainerd Currie was able to say that "[w]ithout exception, the courts recognize the validity of a deed executed under the compulsion of a foreign decree." Currie, *Full Faith and Credit to Foreign Land Decrees*, 21 U. Chi. L. Rev. 620, 629 (1954); see, *e.g.*, *Phillips v. Phillips*, 224 Ark. 225, 272 S.W. 2d 433 (1954); *cf. Farley v. Farley*, 227 Cal. App. 2d 1, 38 Cal. Rep. 357 (1964), cert. denied 379 U.S. 945; *Rozan v. Rozan*, 129 N.W. 2d 694 (N.D. 1964) Because of the decision by the Supreme Court of Arizona in this anomalous case, Professor Currie's conclusion is no longer accurate.

The deeds under which Petitioners claim an interest in Arizona real property were executed by a defendant who appeared in an Idaho divorce proceeding and litigated the issue. No third party rights were involved in the Arizona proceeding. Refusal to accept the deeds is patently violative of the command of the full faith and credit clause of the Constitution and the principles of *res judicata* recognized by this Court as an integrant of that clause. This Court has recognized as a general rule "that a judgment is

entitled to full faith and credit—even as to questions of jurisdiction—when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment." *Durfee v. Duke*, 375 U.S. 106, 111 (1963). Professor Hancock stated the obvious extrapolation:

> The conclusion seems inescapable that if the defendant has executed a conveyance in obedience to such a decree, the courts of the situs [of land] may not constitutionally hold that the execution was an effectual act because the foreign court had no jurisdiction to compel its performance. * * * Can it be seriously contended that, although the court of equity had jurisdiction to compel the defendant to convey the property, it had no jurisdiction to decide the issues of fact on whose adjudication its decree necessarily rested or to impose any enforceable obligation on the defendant, so that if he should elude the officers of the court, all goes for naught? [Hancock, *Full Faith and Credit to Foreign Laws and Judgments in Real Property Litigation: The Supreme Court and the Land Taboo*, 18 Stan. L. Rev. 1298, 1318-19 (1966) (reprinted in Appendix for convenience of the Court).]

Given personal jurisdiction of the parties and litigation of an issue, the full faith and credit clause requires that a state give effect to findings of facts, including jurisdictional facts, made by sister-state courts in rendering their judgments. *Durfee v. Duke, supra; Treinies v. Sunshine Mining Co.*, 308 U.S. 66 (1939); *Stoll v. Gottlieb*, 305 U.S. 165 (1938); *Baldwin v. Iowa Traveling Men's Ass'n*, 283 U.S. 522 (1931).

Reasons for this rule are apparent. Litigation must end at some point, and a rule that does not accord finality to

a judgment based on full and fair litigation of issues would be intolerable. When the judgment has been executed, as here, finality is needed even more. If the Idaho judgment had awarded money damages to the plaintiff, would the Arizona court be permitted to entertain an action for the return of moneys paid in satisfaction of the judgment? The question would obviously be rhetorical but for the fact that the Arizona court has done this when it refuses to recognize deeds executed in fulfilment of the order of an Idaho court of equity. Surely due process of law must limit the power of a court to refuse recognition of property rights created by act of a court of competent jurisdiction.

The need for this Court's attention is apparent. Per *Sherrer v. Sherrer*, 334 U.S. 343 (1948), and other decisions of this Court, a decree of divorce is entitled to full faith and credit without regard to the issue of the divorce court's jurisdiction to entertain the suit—its determination of domicile, the basis of divorce jurisdiction, is not collaterally assailable in a sister state. Divorce actions may be instituted only at the domicile of one of the spouses, and it is essential that divisions of matrimonial property be accorded full faith and credit when the parties are both before the court. To deny full faith and credit in such cases is to deny it in the cases in which it is "most imperative" and "most needed." Currie, *supra* at 627, 648.

Little reason can be found for refusing recognition of divorce decrees ordering conveyances of land, much less refusing effect to the conveyances. This Court's opinion in *Fall v. Eastin*, *supra*, is about all that can be mustered in

support of denial of full faith and credit. There is was held that full faith and credit need not be given to a commissioner's deed executed pursuant to the order of a Washington court. The parties to the subsequent litigation did not include the defendant whose contumacious refusal to comply with the order of court led to the commissioner's deed, whereas in this case the person attacking the deed is the party-grantor. Further, this Court has ruled in *Durfee v. Duke*, 375 U.S. 106 (1963), that state courts must give effect to foreign decrees even though they affect the title to land where there has been litigation of relevant questions. The Arizona Court has thus refused to follow the latest ruling of this Court on this important subject to all state courts. This Court said in *Durfee*:

> It is argued that an exception to this rule of jurisdictional finality should be made with respect to cases involving real property because of this court's emphatic expressions of the doctrine that courts of one State are completely without jurisdiction directly to affect title to land in other States. This argument is wide of the mark. Courts of one State are equally without jurisdiction to dissolve the marriages of those domiciled in other States. But the location of land, like the domicile of a party to divorce action, is a matter "to be resolved by judicial determination." Sherrer v. Sherrer, 334 U. S. at 349. The question remains whether, once the matter has been fully litigated and judicially determined, it can be retried in another State in litigation between the same parties. Upon the reason and authority of the cases we have discussed, it is clear that the answer must be in the negative. [375 U.S. at 115].

On the authority of the principles of the *Durfee* case, the Arizona judgment should be reversed by memorandum opinion.

CONCLUSION

Petitioners pray that this Court will grant their motion for rehearing of petition for writ of certiorari and upon rehearing will reverse the judgment of the Supreme Court of Arizona.

Respectfully submitted,

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I certify that this motion for Rehearing of Petition for Writ of Certiorari is not filed for purposes of delay.

EUGENE L. SMITH

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion for Rehearing of Petition for Writ of Certiorari have been mailed by U. S. mail, postage prepaid, to W. Francis Wilson, 324 Luhrs Building, Phoenix, Arizona and Richard A. Wilson, 401 Mayer Central Building, Phoenix, Arizona.

Eugene L. Smith